

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

SHARON A. MARSHALL
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD STREET, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

February 13, 1997

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROPOSITION 209

Many questions have been asked regarding the status of the City's Equal Opportunity Contracting Program (EOCP) and the Equal Opportunity Program (EOP) since California voters passed Proposition 209, the initiative to amend the State Constitution to prohibit discrimination or preferential treatment by state and other public entities. This memorandum addresses the status of the City's EOCP and EOP programs in light of recent legal developments involving Proposition 209.

Proposition 209 has been legally challenged by the Coalition for Economic Equity (Coalition). Coalition for Economic Equity v. Pete Wilson, No. C 96 4024 TEH (N.D. Cal. 1996). The plaintiffs include the Coalition for Economic Equity, the National Association for the Advancement of Colored People (NAACP), several associations representing the interests of minority and women owned businesses and several individuals adversely affected by the passage of Proposition 209. They seek injunctive and declaratory relief.

Plaintiffs requested a Temporary Restraining Order precluding implementation of the Proposition. They argued Proposition 209 is unconstitutional on equal protection grounds because it places a higher burden on supporters of affirmative action programs for women and minorities than it does on supporters of affirmative action programs for other groups such as the elderly, the disabled or veterans. Essentially, plaintiffs argued, if individuals seek programs to redress past discrimination against women or minorities, they may do so only by amending the constitution.

The defendants, proponents of Proposition 209, disagreed. They responded Proposition 209 does not place an undue burden on particular groups. Defendants argued Proposition 209 is an anti-discrimination provision that applies to all people equally. The Honorable Judge Thelton Henderson disagreed with the defendants. He found the Proposition did place a disproportionate burden on women and minorities and consequently enjoined implementation or enforcement of the Proposition.

Sponsors of the initiative have appealed the judge's ruling. Pending resolution of the appeal, Proposition 209 may not be implemented or enforced. The City need not, therefore, take any action to change its current policies or procedures with respect to hiring, promoting, or contracting, as set forth in the City's EOCP and EOP programs. Even if Proposition 209 had not been enjoined, we believe neither the EOCP nor the City's equal opportunity hiring and promotion policies (EOP) would be affected by passage of Proposition 209. The City's employment process has no goals or quotas. Instead, according to Council Policy 300-10, the City's employment process requires "equal" opportunity in hiring and promotion. As such, the City's policy does not contradict the language of Proposition 209.

Similarly, the EOCP promotes equal opportunity and outreach. As you recall, the City's Minority and Women Business Enterprise (MBE/WBE) program was enjoined by the federal court in 1993. In response to the injunction, all City contract programs were redesigned to remove mandatory participation and/or quotas. Although participation is strongly encouraged, it is, at this time, voluntary and thus does not violate the provisions of Proposition 209.

In closing, we believe the changes made to the City's EOCP and EOP programs at the time of the MBE/WBE litigation have obviated the need for any changes now. The passage of Proposition 209, with or without the injunction, does not require any further changes to the City's EOCP or EOP programs.

Respectfully submitted,

CASEY GWINN
City Attorney

SAM:jrl:011:(043.1)

RC-97-2

C:\dmautop\temp\45.wpd